
U.S. DEPARTMENT OF LABOR

SECRETARY OF LABOR
WASHINGTON, D.C.

Case No. 86-ERA-2

In the Matter of

Thomas G. Bassett,
Claimant

v.

Niagara Mohawk Power Company,
Employer

Order of Remand

Before me for review is the Recommended Order - Dismissing Complaint (R.O.) issued by Administrative Law Judge (ALJ) Robert M. Glennon on March 12, 1986, in the above-captioned case, which arises under the employee protection provision of the Energy Reorganization Act of 1974 (ERA), 42 U.S.C. § 5851 (1982).

The basis for the ALJ's recommendation was that the complaint failed to state a cause of action insamuch as it showed that Complainant had not engaged in a protected activity. In reaching this conclusion, the ALJ noted that "[t]here was no action by Complainant having a connection with any governmental proceeding", R.O. at 4, and applied the Fifth Circuit's ruling in *Brown & Root, Inc. v. Donovan*, 747 F.2d 1029 (1984), which

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held that "employee conduct which does not involve the employee's contact or involvement with a competent organ of government is not protected under section 5851." 749 F.2d at 1036.

Based upon careful review of the entire record in this case, including the memoranda of law filed by the parties with me, I do not accept the ALJ's recommendation for

dismissal of this case. Rather, I find that the complaint, which alleges that Complainant, a Quality Assurance engineer of Respondent has been subjected to a continuing conspiracy, harassment and discrimination, as evidenced most recently by his being "passed over" and "relegated to the bottom of the organization chart" and by denial of temporary handicapped parking privileges in retaliation for performing his assigned tasks and for indentifying deficiencies in Respondent's quality assurance programs, states a cause of action. Accordingly, I remand this case to the ALJ for a hearing on the allegations of the complaint.

I decline to apply in this case the Fifth Circuit's decision in *Brown & Root*. As I indicated in *Richter v. Baldwin Associates*, 84-ERA-9 through 12, (March 12, 1986), slip op. at 11-12, I adhere to my rulings in *Mackowiak v. University Nuclear Systems, Inc.*, 82-ERA-8 (April 29, 1983), *remanded on other grounds*, 735 F.2d 1159 (9th Cir. 1984), and in *Wells v. Kansas Gas & Electric Co.*, 83-ERA-12 (June 14, 1984), *aff'd, Kansas Gas & Electric Co. v. Brock*, 780 F.2d 1505 (10th Cir. 1985), *cert. denied*, No. 85-1403, slip op. (June 30, 1986), to the effect that, under section 5851, prior contact with a governmental agency is not a prerequisite to establishing a protected activity. I specifically held in these cases that employees performing quality assurance functions are engaged in protected activities. That the internal reporting of safety complaints is an activity protected under section 5851 has also been recognized by the Second Circuit, the circuit in which this case arises. *Consolidated Edison Co. v. Donovan*, 673 F.2d 61 (2d Cir. 1982). The ALJ was aware of *Consolidated Edison* but relied on the fact that *Brown & Root* distinguishes that case on the ground that protected activity was not at issue in the case nor discussed by the court. (R.O. at 4). I note, however, that the Second Circuit specifically stated that the complainant in the case "has produced a prima facie case for improper discharge", following which statement the Court set forth the facts in the case. *Consolidated Edison*, 673 F.2d at 63. Since the only activity engaged in by the *Consolidated Edison* plaintiff was internal reporting, I do not

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attribute to the Second Circuit a failure to consider whether purely internal reporting of safety complaints falls within the ambit of section 5851.[1]

There is a further reason why the ALJ erred in recommending dismissal of the complaint. Complainant alleges that the denial of temporary handicap parking privileges "took place while the proceedings arising out of my first ERA complaint (Case No. 85-ERA-34) were still pending and just 22 days prior to my taking the stand to testify in support of that complaint." Complainant's Affidavit In Response To Order To Show Cause (Compl. Aff.) at 4, ¶ 14. Section 5851(a) prohibits discrimination against an employee with respect to any "'privileges" of employment because the employee has "commenced" or has "testified or is about to testify" in a "proceeding for the administration or enforcement of any requirement imposed under" the ERA. Inasmuch as parking can be a privilege of employment and inasmuch as the proceeding in

Complainant's 85-ERA-34 case was a proceeding commenced under the ERA, Complainant has stated a cause of action.

Respondent, in arguing that dismissal is proper in this case, points to other alleged deficiencies in the complaint which it contends compel a dismissal of the complaint even if internal safety complaints are protected under section 5851. As a result of these deficiencies, Respondent contends, the complaint fails to comport with 29 C.F.R. § 24.3(c) (1985), which requires that a section 5851 complaint "include a full statement of the acts and omissions, with pertinent dates, which are believed to constitute the violation." Memorandum of Law for Respondent Niagara Mohawk Power Corporation In Opposition to Complainant's request for Reconsideration (Respondent's Mem. of Law) at 11.

One deficiency alleged by Respondent is the failure of the complaint to identify the protected activity - i.e., to "name a single quality assurance audit in which Complainant participated nor otherwise describe any management deficiency uncovered by Complainant," but rather relies on "broad, unsubstantiated claims of 'conscientious' and 'professional' performance of [Complainant's] duties in the QAD" (Quality Assurance Debartment). Respondent's Mem. of Law at 12. Respondent's argument is without merit. Complainant's letter of complaint, dated August 23, 1985, makes clear that Complainant alleges that Respondent retaliated against him because Complainant performed his quality assurance functions of identifying deficiencies in Respondent's nuclear quality assurance program.

This is a sufficient statement of the acts which Complainant believes constitute the violation. As I held in *Richter v. Baldwin Associates*, slip op. at 9-11, it is not required that every element of a legal cause of action be set forth in an employee's section 5851 complaint. Moreover, the mere allegation that Complainant was assigned quality assurance functions is sufficient since it has been recognized that all quality control personnel are engaged in activity protected by section 5851. *Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d at 1163.

Another deficiency alleged by Respondent is the failure of the complaint to state any adverse employment action subject to redress under section 5851. Although recognizing that the complaint alleged the denial of handicap parking privileges and demotion of Complainant (as a consequence of the challenged organization charts) as the purported adverse acts, Respondent argues that these alleged acts cannot constitute adverse action since denial of the handicap parking privileges was not discriminatory and since Complainant was not actually demoted as a result of the QAD reorganization. Respondent's Mem. of Law, at 13-18. I find this argument of Respondent also to be without merit. Clearly complainant has alleged two different adverse acts. Whether these acts occurred and whether they were discriminatory are matters that can only be

determined after presentation of relevant evidence at a fact finding hearing. Complainant is not required to set forth his proof in his complaint.

Respondent furthermore contends that Complainant's allegations as to his demotion are time barred because his demotion actually occurred in July 1981 when he was demoted from Supervisor to Senior Engineer and not as a result of the reorganization charts issued in August of 1985. *Id*. at 19-21. In this connection, Respondent argues that, despite Complainant's assertion that the reorganization charts are evidence of an ongoing conspiracy, that assertion cannot transform the 1981 demotion into a "continuing violation" so as to sustain the timeliness of the claim. *Id*. Again, whether Complainant's placement on the QAD charts constituted a discrete demotion or was merely an effect of his 1981 demotion is a question of fact to be determined after a factfinding hearing. Complainant in his letter of complaint states that: "[s]hifts in the organization are to begin September 1, 1985 ... Again, I and other more experienced, better qualified personnel are relegated to the bottoms of the charts, while many comparatively 'green' employees

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and newcomers to the corporation are shown in responsible positions," at 1. In the same letter, Complainant also states that "... I now find myself 'passed-over', harassed and discriminated against, and relegated to the bottom of the organization chart." at 2. Moreover, in his affidavit in response to the Show Cause Order, Complainant asserts that the August 1985 reorganization resulted in his "being moved farther down in the department's chain of command," Compl. Aff. at 2, ¶ 7, and that the reorganization opened up a number of managerial or supervisory slots for which he was qualified but which were filled with less qualified individuals. *Id*. at 3, ¶ 8. It is clear, therefore, that Complainant asserts that the reorganization has had an adverse impact on his employment separate and distinct from his 1981 demotion. Whether this indeed is the case is for the fact finder to determine.

Lastly, Respondent argues that Complainant's pleadings fail to allege a prima facie case of discrimination under section 5851, Respondent's Mem. Of Law at 16-18, and seeks dismissal on this ground. An employee's prima facie case under section 5851 consists "of a showing that he engaged in protected conduct, that the employer was aware of that conduct and that the employer took some adverse action against him. In addition, as part of his prima facie case, 'the plaintiff must present evidence sufficient to raise the inference that ... protected activity was the likely reason for the adverse action.'" *Dartey v. Zack Company of Chicago*, 82-ERA-2, (April 25, 1983), slip op. at 7-8. Complainant's pleadings allege the necessary elements of a prima facie case. Whether he can satisfy his burden of proof on each of these elements must await evaluation of the presented at the hearing.

In summary, I find no basis for dismissal of the complaint on the ground that it,fails to state a cause of action. Accordingly, I remand this case to the ALJ for the purpose of holding a hearing to determine whether Complainant was discriminated against by

Respondent in violation of section 5851. In remanding this case, I reach no conclusions, nor should any be inferred, as to the merits of Complainant's complaint.

Therefore, this case is REMANDED for a hearing.

WILLIAM E. BROCK
Secretary of Labor

Dated: JUL 9 1986
Washington, D.C.

[ENDNOTES]

[1] In Complainant's Request For Reconsideration (C.R.R.) filed with me, two other arguments against dismissal of the complaint are made. Complainant argues that, because ALJ Robert J. Feldman found in In the Matter of *Bassett v. Niagara Mohawk Power Corporation*, 85-ERA-34 (Oct. 17, 1985), that Complainant's internal auditing and reporting was protected conduct under section 5851, that issue cannot be relitigated here. C.R.R. at 4-5. Complainant also argues that the regulations implementing the ERA permit only dismissal for cause, 29 C.F.R. 24.5(e)(4), and do not even require an allegation of protected activity. *Id*. at 5. In view of my decision that the complaint in this case states a cause of action, I need not rule on these issues.